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1 UNITED STATES BANKRUPTCY COURT

2 EASTERN DISTRICT OF NEW YORK

3 Case No. 8-16-75545-reg

4 Adv. Case No. 8-16-08178-reg

5 - - - - - x

6 In the Matter of:

7

8 DOWLING COLLEGE,

9

10 Debtor.

11 - - - - - x

12 ZAIKOWSKI,

13 Plaintiff,

14 v.

15 DOWLING COLLEGE,

16 Defendants.

17 - - - - - x

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1 United States Bankruptcy Court
2 290 Federal Plaza
3 Central Islip, New York 11722

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B E F O R E :

HON ROBERT E. GROSSMAN

U.S. BANKRUPTCY JUDGE

1 HEARING re [4] ADJ Summons and Notice of Pre-Trial
2 Conference

3

4 HEARING re [29] Motion to Approve Stipulation Pursuant to 11
5 U.S.C. Section 105 and Fed. R. Bankr. P. 7023 and 9019
6 Approving Settlement, Certify Class B for Settlement
7 Purposes Only, Appoint Class Counsel and the Class B
8 Representative, and Preliminarily Approve the Settlement
9 Pursuant to Fed. R. Bankr. P. 7023, Approve the Form and
10 Manner of Notice to Class Members of the Class Certification
11 and Settlement, Schedule a Final Hearing to Consider Final
12 Approval of the Settlement and Approve the Settlement on a
13 Final Basis by Lauren Catherine Kiss on behalf of Dowling
14 College.

15

16 HEARING re [74] ADJ Order Scheduling Initial Case Management
17 Conference.

18

19 HEARING re [546] ADJ Interim Application for Compensation by
20 Silverman Acampora LLP as Counsel to the Official Committee
21 of Unsecured Creditors for Fees of \$287,638.00 Expenses:
22 \$653.20 by Kenneth P Silverman on behalf of Official
23 Committee Of Unsecured Creditors.

24

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1 HEARING re [591] Motion to Authorize/Direct Leave, Standing,
2 and Authority to Prosecute Claims on Behalf of Dowlings
3 Estate by Anthony C Acampora on behalf of Official Committee
4 Of Unsecured Creditors.

5

6 HEARING re [555] ADJ Interim Application for Compensation by
7 Farrell Fritz, P.C. as Special Counsel for Fees of
8 \$12,873.00 Expenses: \$286.43 by Patrick T Collins on behalf
9 of Farrell Fritz, P.C.

10

11 HEARING re [548] ADJ Interim Application for Compensation by
12 Klestadt Winters Jureller Southard & Stevens, LLP as Counsel
13 to the Debtor and Debtor in Possession for Fees of
14 \$588,383.95 Expenses: \$5,738.26 by Lauren Catherine Kiss on
15 behalf of Dowling College.

16

17 HEARING re [549] ADJ Interim Application for Compensation by
18 Ingerman Smith, LLP as Special Counsel to the Debtor for
19 Fees of \$45,420.00 Expenses: \$1,938.93 by Lauren Catherine
20 Kiss on behalf of Dowling College.

21

22 HEARING re [550] ADJ Application for Compensation by Smith &
23 Downey, P.A. as Special Counsel to the Debtor for Fees of
24 \$6,797.50 Expenses: \$0.00 by Lauren Catherine Kiss on behalf
25 of Dowling College.

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1 HEARING re [551] ADJ Application for Compensation by Eichen
2 & DiMeglio, P.C. as Accountants to the Debtor for Fees of
3 \$22,000.00 Expenses: \$487.76 by Lauren Catherine Kiss on
4 behalf of Dowling College.

5

6 HEARING re [552] ADJ Interim Application for Compensation by
7 FPM Group, Ltd. as Consultants to the Debtor for Fees of
8 \$12,071.42 Expenses: \$4,345.69 by Lauren Catherine Kiss on
9 behalf of Dowling College.

10

11 HEARING re [553] ADJ Interim Application for Compensation by
12 Baker Tilly Virchow Krause, LLP as Tax Accountants to the
13 Debtor for Fees of \$25,000.00 Expenses: \$0.00 by Lauren
14 Catherine Kiss on behalf of Dowling College.

15

16 HEARING re [585] First Motion to Object/Reclassify/Reduce/
17 Expunge Claim # 1 - 8 by Lauren Catherine Kiss on behalf of
18 Dowling College.

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20 HEARING re [586] Second Motion to Object/Reclassify/Reduce/
21 Expunge Claim 1 - 22 by Lauren Catherine Kiss on behalf of
22 Dowling College.

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1 HEARING re [593] Application for Compensation by Baker Tilly
2 Virchow Krause, LLP as Consultants to the Debtor and Debtor-
3 in-Possession for Fees of \$8,234.00 Expenses: \$1,131.43 by
4 Lauren Catherine Kiss on behalf of Dowling College.

5

6 HEARING re [594] Motion to Approve Stipulation Pursuant to
7 11 U.S.C. Section 105 and Fed. R. Bankr. P. 7023 and 9019 ;
8 Certify Class B for Settlement Purposes Only, Appoint Class
9 Counsel and the Class B Representative, and Preliminarily
10 Approve the Settlement Pursuant to Fed. R. Bankr. P.
11 7023, To Approve the Form and Manner of Notice to Class
12 Members of the Class Certification and Settlement and
13 Schedule a Final Hearing to Consider Final Approval of the
14 Settlement on a Final Basis by Lauren Catherine Kiss on
15 behalf of Dowling College.

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25 Transcribed by: Sonya Ledanski Hyde

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22 BY: RICHARD J. MCCORD

23

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25

1 P R O C E E D I N G S

2 CLERK: Dowling College.

3 THE COURT: Some people can sit over there. We
4 don't have sweatshirts.

5 MR. SOUTHARD: Good afternoon, Your Honor. Sean
6 Southard, Klestadt Winters Jureller Southard & Stevens, on
7 behalf of Dowling College, Debtor in Possession. Also with
8 me this afternoon is my associate Lauren Kiss.

9 MS. ROUPINIAN: Good afternoon, Your Honor. Rene
10 Roupinian, appearing on behalf of Lori Zaikowski and the
11 certified WARN class. And with me today is also Lori
12 Zaikowski.

13 MR. MCCORD: Good afternoon, Your Honor. Richard
14 McCord for ACA Financial Guaranty Corp.

15 MR. YANG: Good afternoon, Your Honor. Stan Yang,
16 United States Trustee.

17 MR. BERKOWITZ: Good afternoon, Your Honor. Adam
18 Berkowitz from Garfunkel Wild for UMB.

19 MR. WARMUTH: Good afternoon. Glenn Warmuth on
20 behalf of Kimberly Poppiti.

21 MR. KLEINBERG: Afternoon, Judge. Howard
22 Kleinberg, Meyer Suozzi for the board of trustees.

23 MR. FREIDMAN: Good afternoon, Your Honor. Ronald
24 Friedman, SilvermanAcampora. Also with me is my colleague
25 Ryan Powers on behalf of the Unsecured Creditors Committee.

1 CLERK: Please state your phone appearance.

2 MR. HAMMEL: Yes, good afternoon, Your Honor. Ian
3 Hammel, also on behalf of UMB Bank. Mr. Berkowitz in the
4 courtroom will be handling matters from our end today.

5 MR. PFEIFFER: And good afternoon, Your Honor.

6 Brian Pfeiffer from White & Case representing ACA Financial.

7 THE COURT: That's it? Okay.

8 MR. SOUTHARD: Thank you, Your Honor. Again, for
9 the record, Sean Southard on behalf of the Debtor. Your
10 Honor, we filed the proposed agenda which, unless Your Honor
11 prefers to take matters in a different order, I --

12 THE COURT: I want to thank you for filing all
13 that stuff Friday. I had nothing else to do.

14 MR. SOUTHARD: Well, we did want to show you some
15 progress, Your Honor, and I apologize if the timing was --

16 THE COURT: That's okay.

17 MR. SOUTHARD: -- rather near this hearing. So,
18 Your Honor, that having been said, we would propose to start
19 with a brief status conference to tell you about some
20 updates that have occurred, which I think are all to the
21 good.

22 So, Your Honor, I'm pleased to say that on Friday
23 at about 6 o'clock, wires were issued and the Brookhaven
24 Campus sale, the triple five aviation industries closed.
25 So, there was quite a push, and right up until 6 o'clock

1 wire deadline, but everything closed and we're pleased to
2 report that major event to the Court.

3 The proceeds are now with the Debtor and its DIP
4 account and other than real estate taxes that were paid out
5 at closing and the more typical closing-related title
6 charges and the like, those funds reside with the Debtor in
7 its DIP account.

8 One other expected charge at some point has to do
9 with the commission to the real estate brokers, the campus
10 agents as we have referred to them, and discussions continue
11 about potentially a resolution whereby the case parties, the
12 creditor constituents might support some level of
13 application.

14 THE COURT: Did we ever retain them?

15 MR. SOUTHARD: We did, Your Honor. We did.

16 THE COURT: Okay.

17 MR. SOUTHARD: And the terms of their retention
18 did provide for a commission of 4 percent in the aggregate.
19 That said, discussions by and among some of the creditor
20 constituents are continuing.

21 So, my hope is that we'll be able to come forward
22 at some point in the near future with a proposed consensual
23 proposal to Your Honor to consider, but as I stand here
24 today, I don't have that.

25 So, Your Honor, now that that Brookhaven campus

1 has closed and based upon what we hope will be a settlement
2 today, that Your Honor will first consider in relation to
3 the sort of global employee settlement, the Debtor and its
4 creditor constituencies were able to complete the process
5 related to the drafting of a plan and disclosure statement,
6 and those two documents were filed on Friday.

7 It is my expectation that notwithstanding the
8 filing of those documents on Friday that we will undoubtedly
9 continue to receive and discuss comments from various of the
10 parties involved as well as others who had -- not had the
11 opportunity to preview that document or those documents.

12 THE COURT: So, we don't have a hearing date yet
13 to approve the disclosure statement?

14 MR. SOUTHARD: We do not, Your Honor.

15 THE COURT: Okay.

16 MR. SOUTHARD: And that's one of the matters we
17 were hopeful to take up with the Court today. In terms of
18 our process and expectation on the Debtor side and in
19 consultation with the creditors, we believe that we can file
20 a motion seeking approval of the disclosure statement and
21 related noticing, and ballots, and solicitation procedures
22 either at the end of this week or early next week.

23 If we were able to file those by, I believe, the
24 middle of next week, which is October 3rd, file and service,
25 it would be possible to hold a disclosure statement hearing

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1 on Monday, November 5th, which we were roughly targeting as
2 subject to the Court's calendar. And then we're targeting --
3 - assuming all goes as planned -- a confirmation hearing of
4 December 17th, which again is a Monday.

5 So, a rough timeline -- the hope would be to try
6 and conclude this case in terms of confirmation before the
7 end of the year, and then the case would proceed to an
8 effective date. And as the plan contemplates, there would
9 be a plan administrator to essentially wrap up what's left
10 of the Debtor, wind it down, deal with things like
11 transferring the endowed funds and other restricted assets.

12 And then there would also be a litigation trust,
13 as contemplated by the plan, that would bring whatever suits
14 and claims it deems necessary on behalf of general unsecured
15 creditors. So, in big picture terms, Your Honor, that's, I
16 think, what the parties are contemplating, subject to Your
17 Honor's calendar.

18 THE COURT: That's fine.

19 MR. SOUTHARD: So, with that, Your Honor, I think
20 I would be ready to turn -- unless any other parties wanted
21 to discuss status of any matters -- turn to this afternoon's
22 calendar. Okay?

23 THE COURT: Go ahead.

24 MR. SOUTHARD: Thank you, Your Honor. So, we have
25 a number of fee applications on this afternoon, Your Honor.

1 Those by in large are third interim applications that cover
2 the period from --

3 THE COURT: Let's go with the Stipulation of
4 Settlement first. Let's do the substantive stuff before we
5 do fee apps.

6 MR. SOUTHARD: Okay.

7 THE COURT: Not that fee apps aren't substantive
8 for you guys but --

9 MR. SOUTHARD: No, that's fine, Your Honor. So,
10 we have in addition to the -- oh, Your Honor is referring to
11 the standing motion by the committee? Okay, I will --

12 THE COURT: No, no. First I want to do the
13 Stipulation of Settlement.

14 MR. SOUTHARD: Oh, the WARN Act.

15 THE COURT: The WARN Act claims.

16 MR. SOUTHARD: Okay, very well, Your Honor. All
17 right. So, Your Honor, we have appeared before you on -- in
18 many instances in relation to the complaint that was first
19 commenced just days after the bankruptcy by Lorie Zaikowski.

20 THE COURT: There were four counts in the
21 complaint, right?

22 MR. SOUTHARD: Correct.

23 THE COURT: Just what are the four counts again?

24 MR. SOUTHARD: Bear with me one moment, Your
25 Honor. Counsel to the Plaintiffs was just kind enough to

1 hand me a copy of the complaint, so I don't have to dig
2 through my documents here. So, Your Honor, the first claim
3 is a claim under the Federal WARN Act. And that seeks --
4 that alleges that the Debtor failed to give adequate notice
5 prior to the termination without cause of substantially all
6 employees. The second cause of action is under the New York
7 WARN Act. Again, a very similar claim. The third cause of
8 action is for unpaid wages; and the fourth cause of action
9 was breach of contract and implied covenant of good faith
10 and fair game.

11 THE COURT: So, the class for -- the class has
12 within it a complaint -- probably not the way to put it but
13 -- of four causes of action. Two are WARN Act causes of
14 action and two are wage claims causes of action, right?

15 MR. SOUTHARD: Correct. That's correct.

16 THE COURT: And each are different. The WARN Act
17 creates damages; the wage claims create its own issues. And
18 this class represents all the members who didn't opt out of
19 the employees or other parties similarly situated at Dowling
20 who have claims for either wages or WARN Act damages, is
21 that right?

22 MR. SOUTHARD: To be precise, because we now have
23 two classes that we are discussing --

24 THE COURT: Right.

25 MR. SOUTHARD: So, Class A consists of former

1 employees of Dowling who were terminated as a result of mass
2 layoffs ordered by the Debtor on or about June 1st of 2016
3 or within 30 days of that date, who were not given the
4 advance notice of termination. So, of that Class A group,
5 which is a broad group, there were just two parties who
6 opted out, okay?

7 And then in addition to that, Your Honor, there is
8 a proposed Class B that we're asking Your Honor to certify
9 today for settlement purposes. And those folks number
10 approximately 67 and they include retirees who were not
11 terminated as a result of the mass layoff...

12 THE COURT: So they only have wage claims?

13 MR. SOUTHARD: They only have compensation or
14 termination -- previous termination-based claims. So, for
15 instance --

16 THE COURT: Are any of their claims priority
17 claims?

18 MR. SOUTHARD: Yes. Yes.

19 THE COURT: Okay.

20 MR. SOUTHARD: But not all.

21 THE COURT: Well, in either case not all claims
22 are priority claims.

23 MR. SOUTHARD: That's correct.

24 THE COURT: So, in the Class A group, there were
25 proofs of claim filed for about 5 million, is that right,

1 give or take?

2 MR. SOUTHARD: I can get you a figure on that,
3 Your Honor.

4 THE COURT: 5.3 or something?

5 MR. SOUTHARD: That's approximately --

6 THE COURT: Okay. And those proofs of claim were
7 the Class A parties who are all former employees that were
8 terminated at Dowling, represent claims that they believe
9 they have for wages and other damages, including the WARN
10 Act damages?

11 MR. SOUTHARD: Yes, with the exception that on --
12 with regard to the WARN Act damages, class counsel filed a
13 separate claim asserting on their behalf WARN --

14 THE COURT: Would that be duplicative or --

15 MR. SOUTHARD: To the extent they filed it -- yes,
16 it would -- to the extent an individual employee asserted
17 WARN Act claims in their individual claim, it would be
18 duplicative.

19 THE COURT: So, do we know a single number that
20 would represent total filed claims of the Class A class?
21 It's 5.3 plus something. Is the something a round-off or
22 substantial?

23 MR. SOUTHARD: It's -- we have no ability to
24 specifically quantify the amount.

25 THE COURT: Well, how much -- how much is the

1 amount of the proof of claim filed by counsel for WARN Act
2 claims?

3 MR. SOUTHARD: It was an unliquidated amount, Your
4 Honor.

5 THE COURT: So, we don't know then? Okay.

6 MR. SOUTHARD: I mean, we have spent a great deal
7 of time calculating what the potential amount of that claim
8 could be as part of our settlement but...

9 THE COURT: Now, the settlement says -- and this
10 is the part you've got to explain to me -- the Class A
11 members of the class had a chance to not be members of the
12 class back in 2017. Whoever's in there is in the class, but
13 they have a second chance to withdraw from the settlement,
14 according to the terms of the settlement.

15 MR. SOUTHARD: Your Honor, only certain -- so,
16 there's a subset of Class A who did not receive that
17 original notice but are nonetheless properly within Class A.
18 So those --

19 THE COURT: Right. But my point -- my point --

20 MR. SOUTHARD: Those folks would have the
21 opportunity now to potentially opt out in addition to
22 object.

23 THE COURT: But if people opt out of the
24 settlement, it's irrelevant whether they opt out of the
25 class or not, right? If they opt out of the settlement,

1 what's the purpose of remaining in the class? They can't
2 get out of the class but they can opt out of the settlement,
3 right?

4 MR. SOUTHARD: I think the effect would be --

5 THE COURT: Your settlement documents were saying
6 --

7 MR. SOUTHARD: The effect would be one in the
8 same, I think.

9 THE COURT: I don't know. I'm just trying to
10 figure this out. You could opt out of this settlement
11 agreement but you can't opt out of the class anymore because
12 that time expired in 2017. Where would that leave those
13 folks?

14 MS. ROUPINIAN: Your Honor, Rene Roupinian
15 (indiscernible). Okay, so the members that receive a Class
16 A that receive notice and opt to (indiscernible) themselves
17 from the class are now bound by the settlement. They can
18 object but they cannot exclude themselves from the
19 settlement. They had that opportunity. The notice was
20 clear that any --

21 THE COURT: Well, you've got to make that clear
22 because I didn't read that. What I read is they have an
23 opportunity now to decide not to be a participant in the
24 settlement, because when they opted in or out of the class
25 it was a year before the settlement was ever created. So, I

1 don't know that it means anything but it creates some
2 confusion. That's one point.

3 The settlement itself is a settlement, as I
4 understand it, of all the tracks, so to speak, that are in
5 the complaint. One set of tracks is the WARN Act and the
6 damages one would have for the WARN Act problems; and two is
7 a settlement for what the priority claims of those employees
8 would have been anyway. Right?

9 MR. SOUTHARD: Correct.

10 THE COURT: So, everybody in that class already
11 has a right to a priority claim, period, whether you did a
12 settlement or not. Now, I'm not sure it would be funded but
13 the settlement, the 1.3, is comprised both of WARN Act
14 damages and of priority claims that those folks have anyway
15 under the Code.

16 MR. SOUTHARD: As negotiated, that's right, Your
17 Honor.

18 THE COURT: As negotiated? As -- the only thing
19 you negotiated is the WARN Act; the other thing you didn't
20 negotiate, it's statutory. You get the --

21 MR. SOUTHARD: No, we did negotiate it.

22 THE COURT: Well, you had to negotiate that they
23 could get paid. I'm just talking about the Code itself.

24 MR. SOUTHARD: Well, just in terms of the
25 calculation -- so, there are parties -- there are claimants

1 here who are former employees, who as class members will be
2 receiving non-WARN priority claims that they did not make a
3 claim for.

4 THE COURT: The non --

5 MR. SOUTHARD: They themselves.

6 THE COURT: Non-priority claims or non-WARN Act
7 claims?

8 MR. SOUTHARD: Non-WARN priority.

9 THE COURT: Did we create a priority return for
10 anybody who doesn't deserve a priority return?

11 MR. SOUTHARD: Not as negotiated, Your Honor. And
12 that's -- it becomes -- it's complicated in that you have
13 multiple claims that have been filed, scheduled by the
14 Debtor... So, filed by individuals, scheduled by the
15 Debtor, filed by class counsel, and then filed by the U.S.
16 Department of Labor.

17 THE COURT: See, I understand that. I'm just at a
18 very simple stage of this. There are a universe of folks
19 within your class who, had you never shown up, would have a
20 right to priority claims for a certain amount of money each
21 under the Code -- if the money were available. Whether you
22 were here or not, those folks -- some of those folks get
23 priority wage claims, right?

24 MR. SOUTHARD: Yes.

25 THE COURT: Has to.

1 MR. SOUTHARD: Yes.

2 MS. ROUPINIAN: Did they have a right to that,
3 Your Honor? Yes. Have they made a claim necessarily for
4 those dollars? No.

5 THE COURT: All I'm talking about is the statute.

6 MS. ROUPINIAN: Okay.

7 THE COURT: If you list somebody as an employee
8 and he was getting paid or she was getting paid, the Code
9 says a certain amount of moneys to be paid to them are
10 priority claims. Priority claims come ahead of unsecured
11 creditors. Behind others, ahead of some. Simple.

12 WARN Act claims themselves are not administrative
13 or priority claims, are they?

14 MS. ROUPINIAN: (indiscernible) Your Honor.

15 MR. SOUTHARD: They are not administrative, Your
16 Honor. They are priority.

17 THE COURT: But they're not administrative claims?

18 MR. SOUTHARD: Correct.

19 THE COURT: And this case has no money in it,
20 other than what is being carved out, to be pay anybody?

21 MR. SOUTHARD: That is correct, Your Honor.

22 THE COURT: Okay.

23 MR. SOUTHARD: It is only through an inter-
24 creditor settlement effectively that there's enough adequate
25 funding to pay this level of claim.

1 THE COURT: And I'm sure we don't know of the
2 million-3, give or take, that's the basis of this
3 settlement, what is attributable to the WARN Act damages and
4 what is attributable to the prior claims, wage claims.
5 Unless you guys did that study.

6 MR. SOUTHARD: Well, an interesting wrinkle in the
7 --

8 THE COURT: That's what we need, more wrinkles.

9 MR. SOUTHARD: -- in the Code, Your Honor, is --
10 the Code does not prefer within 50784 or 50785 WARN versus
11 non-WARN priority. If you have, say, the relevant max claim
12 for these affected claimants as of the date of this filing
13 is \$12,850.

14 THE COURT: Right.

15 MR. SOUTHARD: So, if a claimant has a claim for -
16 - total aggregate priority claims for \$20,000, ten of which
17 are based on WARN, ten of which are non-WARN, the Code
18 doesn't tell us how to delineate among them.

19 THE COURT: But if I had no WARN Act claims net to
20 the individual, he'd be getting the same amount of money.
21 He doesn't care.

22 MR. SOUTHARD: No, Your Honor.

23 THE COURT: Why not?

24 MR. SOUTHARD: Not -- I mean, there may be
25 instances where that is true among the 440 claimants that

1 we're talking about, but certainly not everyone.

2 THE COURT: Okay. What are the non-WARN Act
3 claims that are in this settlement?

4 MR. SOUTHARD: Meaning, what type --

5 THE COURT: You have two definitions.

6 MR. SOUTHARD: Type of claims?

7 THE COURT: Yes. And who cares? I mean, why are
8 we defining them?

9 MR. SOUTHARD: Well, Your Honor, there --
10 essentially, all of the other --

11 THE COURT: But not unsecured?

12 MR. SOUTHARD: Well, they are unsecured.

13 THE COURT: Do the non-WARN Act claims become
14 unsecured claims?

15 MR. SOUTHARD: Many do.

16 THE COURT: And they drop into the unsecured
17 creditor pool?

18 MR. SOUTHARD: Well, in the example that I just
19 gave Your Honor where there's -- a claimant has \$20,000 in
20 otherwise priority entitlements, only 12850 can be priority.
21 So any excess would automatically flow over to an unsecured
22 claim.

23 THE COURT: So there's a certain amount of money
24 that this settlement pays, and there's a certain amount of
25 money that it shifts into the unsecured family, right?

1 MR. SOUTHARD: Correct, Your Honor.

2 THE COURT: Okay.

3 MR. SOUTHARD: It establishes -- if approved by
4 Your Honor and the participants don't opt out who are
5 entitled to otherwise opt out, they will receive at the end
6 of this an allowed priority claim amount and an allowed
7 general unsecured claim.

8 THE COURT: Okay. When those folks end up to be
9 general unsecured creditors, is there anything in this
10 settlement where they've released parties that would prevent
11 them from being part of an unsecured -- getting a
12 distribution out of the unsecured family, the unsecured
13 class?

14 MR. SOUTHARD: No.

15 THE COURT: All right. And there's no cause of
16 action that they would have as an unsecured creditor that
17 they could potentially bring that's being released by their
18 acceptance of the settlement?

19 MR. SOUTHARD: They are agreeing that the allowed
20 general unsecured claim that they would receive is in
21 satisfaction of -- and they would otherwise release claims
22 they might've served.

23 THE COURT: Well, hold it. I just asked you that.

24 MR. SOUTHARD: I think we're talking past one
25 another, and I apologize.

1 THE COURT: That's okay, I just need to understand
2 it. If the unsecured creditors pool consists of \$20, and
3 this unsecured portion of that 20 is 5 that came from this
4 group, and the unsecureds collect \$15 in lawsuits or
5 whatever they do, does the \$15 get racked up among everyone
6 or just the folks who were not participants in the
7 settlement?

8 MR. SOUTHARD: Everyone.

9 THE COURT: All right.

10 MR. SOUTHARD: So, if these -- if this is
11 approved, there will be --

12 THE COURT: So the only thing they're waiving are
13 claims that they have for WARN Act damages or priority wage
14 payments? Nothing else is being waived, released, given up?

15 MR. SOUTHARD: Well, I think that's why we're
16 talking past one another is because what I'm saying is
17 they're receiving an allowed claim for their damages, which
18 includes the priority piece that'll get paid pretty close to
19 confirmation if this all goes --

20 THE COURT: I got the priority and I've got the
21 WARN Act.

22 MR. SOUTHARD: And then they're going to have an
23 allowed unsecured claim --

24 THE COURT: Which they can get paid for?

25 MR. SOUTHARD: -- which they will participate...

1 So, all of these folks in the aggregate will have six --

2 THE COURT: Hold it. They can get paid for it?

3 Simple language.

4 MR. SOUTHARD: Yes. As part of the class under
5 the plan.

6 THE COURT: The unsecured class?

7 MR. SOUTHARD: Correct, correct.

8 THE COURT: Okay, so that's all I'm saying. So
9 the same person who benefitted from the settlement you did,
10 which took care of WARN Act and priority, is still in the
11 game to recover his or her un -- allowed unsecured claim --

12 MR. SOUTHARD: Absolutely.

13 THE COURT: -- if the committee or others are
14 successful in bringing money in?

15 MR. SOUTHARD: Absolutely, Your Honor.

16 THE COURT: Everybody agrees to that?

17 MR. WARMUTH: No, not quite, Your Honor. I don't
18 quite agree with that. Glenn Warmuth --

19 THE COURT: This is like a Perry Mason moment.
20 Does anybody remember Perry Mason here? You would.

21 MR. WARMUTH: The reason I don't agree with that
22 is the unsecured claim is being reduced --

23 THE COURT: Who do you represent?

24 MR. WARMUTH: Kimberly Poppiti. So, Ms. Poppiti's
25 unsecured claim now is about 200 and something. And in the

1 settlement she'll get an agreed unsecured claim -- it won't
2 contest further but it'll be much lower.

3 THE COURT: Right.

4 MR. WARMUTH: So that's the essence.

5 THE COURT: Okay.

6 MR. WARMUTH: She's still in the game but she's
7 only in the game for 50 percent of where she was.

8 THE COURT: Well, but that's because that's what
9 she agreed to do.

10 MR. WARMUTH: Correct.

11 THE COURT: So, again, simply put, the unsecured
12 class at the end of this day consists of claimants of people
13 who were not part of this settlement, and people who are
14 part of this settlement in an amount equal to the allowed
15 amount of the unsecured claim done as part of the
16 settlement.

17 So if they had a million dollars, they can have a
18 dollar for all I -- I don't care -- it's whatever they
19 agreed to. But they can collect that dollar and validly
20 have an interest in the unsecured class. They never lose
21 that. What they lose is the amount of it because it's
22 compromised through the first part of the settlement.

23 If someone opts out of it completely -- you said
24 they can't --

25 MS. ROUPINIAN: Part of them can and part of them

1 can't, Your Honor.

2 THE COURT: For the moment. So, if someone were
3 to opt out, that person would be able to -- this isn't the
4 deal you cut, I understand that -- but if you did an opt
5 out, that person would then keep the maximum amount of their
6 unsecured claim, whatever that is, as well as their wage
7 claim, priority claim, and their WARN Act damage claim?

8 MR. SOUTHARD: They would be unaffected by the
9 settlement, Your Honor. So, we would -- yes is the answer.
10 And we would --

11 THE COURT: But that's not a deal you guys cut?

12 MR. SOUTHARD: We would have to object to their
13 claim and engage in --

14 THE COURT: Yeah, but it's simpler than that.
15 This deal is predicated, I'm certain, on whoever's funding
16 this, which is the secured creditor, not having to look over
17 his shoulder that people will come and sue him.

18 MR. SOUTHARD: Correct, Your Honor.

19 THE COURT: And so you have a provision in there
20 that if 5 percent or more opt out, which is why there has to
21 be an opt out because I read that -- opt out, the deal isn't
22 done. The deal is dead.

23 MR. SOUTHARD: There's two such triggers or
24 thresholds, Your Honor. One is that if we need to -- if
25 there is more than 5 percent of the priority dollars that

1 opt out, then the Debtor's estate has the opportunity to
2 back out of the settlement. Likewise, if --

3 THE COURT: But not the funder? Not the -- these
4 are all funding through, I assume, the secured creditor?

5 MR. SOUTHARD: Correct.

6 THE COURT: Creditors.

7 MR. SOUTHARD: They have consultation rights.

8 THE COURT: But what counsel is telling me is that
9 all of those folks who opted in or did not opt out back in
10 2017 have no choice. They have to take this settlement.

11 MR. SOUTHARD: I believe that's what the law
12 provides, and that is definitely counsel's position as I
13 understand it.

14 THE COURT: Is that everybody's position? Did
15 anybody else take a different position?

16 MR. SOUTHARD: It's the Debtor's position.

17 THE COURT: So you agree with that?

18 MR. SOUTHARD: We do.

19 THE COURT: Okay.

20 MS. ROUPINIAN: Your Honor, they do have an
21 opportunity to object. They can object (indiscernible)
22 objection (indiscernible) valid...

23 THE COURT: But if they have no right to opt out,
24 how can they object?

25 MR. SOUTHARD: On grounds of reasonableness, Your

1 Honor.

2 THE COURT: What?

3 MR. SOUTHARD: On grounds of reasonableness or
4 construct.

5 MS. ROUPINIAN: Yeah, they can say, "I think you
6 got my amount wrong" or something --

7 THE COURT: Can I say, "I don't like the deal"?

8 MS. ROUPINIAN: They can say they don't like the
9 deal but then the Court --

10 THE COURT: And can I find as to an individual
11 that they don't like it so I'm going to grant it?

12 MS. ROUPINIAN: The Court is required to pass on
13 whether the settlement is fair, reasonable, and adequate,
14 and --

15 THE COURT: If I say the settlement in total is
16 fair, reasonable, and adequate -- fair and reasonable, I
17 don't see how anyone, if you're right, isn't party to the
18 settlement.

19 MS. ROUPINIAN: Right. If their objection is "I
20 don't think it's fair" and the Court says it is fair, then
21 that objection --

22 THE COURT: Well, let's say somebody walks in and
23 says, "I had a \$300,000 unsecured claim and the Silverman
24 firm are geniuses, they're going to go out and mine the
25 fields and bring in a huge amount of money, and I don't need

1 a dollar -- I'd rather go for the \$10." You're saying they
2 can't do that?

3 MS. ROUPINIAN: If they had an opportunity to
4 exclude themselves, then they did take advantage of --

5 THE COURT: No, they had an opportunity to exclude
6 themselves before there was ever a settlement on the table.

7 MS. ROUPINIAN: Correct. But the notice --

8 THE COURT: So, that's not really an opportunity
9 to exclude yourself.

10 MS. ROUPINIAN: From the class, Your Honor, which
11 gives them notice that by not excluding themselves they're
12 bound by any judgment or settlement of the case. So that
13 was their opportunity to say, "You know what? I don't want
14 to see how this..."

15 THE COURT: All right. My experience in this is
16 that 99 times out of 100 you're right. We had a class
17 action in this court. One person decided to not opt out and
18 he got paid big. And this was on olive oil. Everybody else
19 got twigs and this guy got money. So, it was one person all
20 across the country.

21 But don't be surprised if somebody comes in here
22 and makes an argument on an analysis of the risk-rewards of
23 this deal: "I like my chances with the unsecured pool, and
24 then I'm going to have to make a decision on that."

25 MR. SOUTHARD: Understood, Your Honor.

1 THE COURT: As long as we all recognize that
2 that's a possibility.

3 MR. SOUTHARD: I would also like it to be crystal
4 clear that the Debtor spent a great deal of time analyzing
5 in particular the non-WARN entitlements.

6 THE COURT: I don't recall that. I think, and I
7 don't really remember -- I think these guys may remember
8 because they were in the case -- that the person who played
9 this card just did. I don't think there was a lot of logic
10 behind what they did, but they got paid off.

11 MR. SOUTHARD: Well, I only say this, Your Honor,
12 because there are such parties in the courtroom today that
13 we will object, the Debtor will object to the claims that we
14 don't believe are appropriately lodged.

15 THE COURT: Sure.

16 MR. SOUTHARD: So it's not as if they can simply
17 hold out.

18 THE COURT: It is a tough row to hoe for them, I
19 understand that.

20 MR. SOUTHARD: That's my point.

21 THE COURT: And -- but I'm just putting on the
22 record that I'm aware, so you all are aware, and then I have
23 to review this question about whether a party is bound by a
24 settlement that's entered into by the class -- it probably
25 is, and you know more about this than I do -- even though

1 the settlement's a year after they decided to be in the
2 class. But I think you're right, but I've got to look at
3 that.

4 So the settlement then sets an amount of allowed
5 unsecured claims, it pays them some amount of their priority
6 claims and some money for the damages on the WARN Act that's
7 equal to a million-3 divided in some fashion by all the
8 members of Class A claims, correct?

9 MR. SOUTHARD: Yeah, there's approximately 1.35 in
10 Class A and approximately 70,000 in Class B priority claims,
11 for a total of 1.42.

12 THE COURT: And it provides that counsel's fees
13 are 350 plus 10 for expenses?

14 MR. SOUTHARD: Correct, Your Honor.

15 THE COURT: All right, I understand it.

16 MR. SOUTHARD: And there is a provision that in
17 the event there are opt outs or folks are able to convince
18 Your Honor that it's unfair such that we fall below an 85
19 percent threshold of participants, that counsel's fees would
20 be adjusted in a pro rata fashion.

21 THE COURT: I saw that. Okay. Now, you're not
22 asking me to approve this today?

23 MR. SOUTHARD: We're asking you specifically, Your
24 Honor for preliminary approval of the settlement and allow
25 us -- and approve the forms of notice that would go out to

1 the different class participants such that we can come back
2 before Your Honor in 35-45 days --

3 THE COURT: And the notice doesn't provide an opt
4 out; the notice just says, "Here's the deal we've got for
5 you and you have a right to object if you want." Is that
6 right?

7 MR. SOUTHARD: Your Honor, there are three
8 notices. The notice to the largest group, which are the
9 Class A members who received prior notice and didn't opt
10 out, lets them know the terms of the settlement and lets
11 them object. It doesn't give them an opt out --

12 THE COURT: And how did you determine the amount
13 of the unsecured claims that they're going to have? If you
14 cut their unsecured claims, how did everybody do that? How
15 did you figure out what it should be?

16 MR. SOUTHARD: An extensive analysis of their
17 entitlement.

18 THE COURT: So this is what you think they're
19 entitled to. It wasn't an arbitrary -- giving you 20 cents
20 on the dollar?

21 MR. SOUTHARD: Most definitely not.

22 THE COURT: Okay. So there's a support for each
23 party whose remaining unsecured claim is allowed at X
24 dollars -- there's support for that?

25 MR. SOUTHARD: Yes, Your Honor. And, indeed, one

1 of the changes that we most recently made to the updated
2 versions of the notices that we filed on Friday include
3 reference to some big picture assumptions --

4 THE COURT: Is that that spreadsheet with the tiny
5 little numbers?

6 MR. SOUTHARD: It is, Your Honor.

7 THE COURT: I appreciate that.

8 MR. SOUTHARD: There are footnotes that are very
9 small, I will acknowledge that.

10 THE COURT: I do appreciate that.

11 MR. SOUTHARD: That's why my eyes are so poor now
12 as well. So, Your Honor, those were updated to give more
13 information and allow creditors to more easily conclude why
14 their number is what their number is.

15 MS. ROUPINIAN: I was just going to say, Your
16 Honor, in addition to the class notice in the schedule
17 that's individualized for each class member -- and it
18 explains what the components of the priority portion is and
19 the general unsecured portion. So they can go down and see
20 what position they held at the university and see what they
21 were entitled to for severance, wage reduction, so forth,
22 and so on. And we did our best to put that in layman's
23 terms to reduce the amount of inquiry and concern that
24 somehow we arbitrarily --

25 THE COURT: So, your best efforts result in these

1 folks getting their WARN Act settled amounts, WARN Act wage
2 claims, and their rightful unsecured claim preserved?

3 MR. SOUTHARD: That's right, Your Honor.

4 THE COURT: Right. So the only thing that's being
5 compromised, if it is at all, are the WARN Act claims and
6 the fact that they will get a priority payment. Because,
7 otherwise, if you didn't have a deal, they wouldn't get
8 anything, is the theory of this?

9 MR. SOUTHARD: That's accurate, Your Honor.

10 THE COURT: All right. Does anybody else want to
11 be heard on this? On the settlement? Okay, I'm fine with
12 it. At this point, what I would like to do is... Yeah,
13 that's the deal you cut. I'm not going to... If people
14 object, I'll deal with the objections, and I'm holding that
15 open as to how I will deal with it and the scope of what I
16 will deal with. I'm not limiting that today.

17 But I will let you circulate this for approval or
18 whatever you want to do on that settlement. Because I think
19 it does certainly meet the standard. I think it -- from the
20 position of these folks and the position of the economics of
21 this Debtor, it's certainly worth pursuing and I think it's
22 certainly worthwhile for the Court to approve the
23 circulation of it.

24 But I will reserve the right to review an
25 objection in any form that is filed, as long as -- period.

1 So, with that, go ahead and circulate that.

2 MS. ROUPINIAN: Thank you, Your Honor. There is a
3 preliminary approval order proposed that's attached to the
4 settlement agreement as Exhibit 2. And it does ask for a
5 date for the final appearance hearing. I will propose
6 November 5th. That is the (indiscernible).

7 MR. SOUTHARD: That was the suggested date, Your
8 Honor, that I mentioned earlier.

9 THE COURT: Do you want to do this on a regular
10 calendar date? What are we going to have on that date
11 besides that?

12 MR. SOUTHARD: At present, the only thing we would
13 contemplate is the disclosure statement, approval hearing
14 and this --

15 THE COURT: Yeah, neither -- if it becomes more
16 confrontational I'll change the date, but other than that
17 just leave it for the 5th. Put in the 5th.

18 MR. SOUTHARD: Also at 1:30, Your Honor?

19 THE COURT: Yes. If it becomes a contested
20 process then I'll move the date to a non-calendar date.

21 MR. SOUTHARD: Thank you, Your Honor.

22 MS. ROUPINIAN: Thank you, Your Honor.

23 THE COURT: Good. Thank you.

24 MR. SOUTHARD: Your Honor, turning to the other
25 matters on this afternoon's calendar, we have before we get

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1 to the fee applications, Your Honor, two rounds of omnibus
2 claims objections. The first on the objection, Your Honor,
3 is Docket Number 585, and that objection seems to reclassify
4 essentially the claims that were set forth improperly as
5 priority or secured claims.

6 THE COURT: There's no objections to this?

7 MR. SOUTHARD: No responses. There were two, I
8 think, informal responses that we received and nothing has
9 been filed, and no one is hear objecting.

10 THE COURT: Anybody else wish to be heard on this?
11 The Court will grant that motion.

12 MR. SOUTHARD: Thank you, Your Honor.

13 (Whereupon these proceedings were concluded at 2:30 PM)

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5

Sonya
6 Ledanski Hyde

Digitally signed by Sonya Ledanski
Hyde
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8 Sonya Ledanski Hyde

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24

25 Date: October 3, 2018

[& - afternoon's]

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